In the High Court of Judicature at Madras

Date: 1.2.2002

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The Honourable Mr Justice M.KARPAGAVINAYAGAM

Criminal Appeal No.809 of 1998

Selvi @ Selvarani ..Appellant

versus

Assistant Commissioner of Police,
Royapuram Range,
Chennai-13. .. Respondent

Appeal against the judgment dated 2.9.1998 passed in CC No.206 of 19 93 by the Special Judge, Special Court, NDPS Act, Chennai, convicting the accused Selvi @ Selvarani and sentenced to undergo R.I.for 10 years and a fine of Rs.1 lakh in default to undergo one year S.I.

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! for appellant : Mr V.Sambamurthy

^ for respondent: Mr E.Raja
Addl. Public Prosecutor

: JUDGMENT

Selvi @ Selvarani, the appellant herein, was convicted for the offence under Section 8(c) read with Section 21 N.D.P.S. Act and sentenced to undergo rigorous imprisonment for 10 years and a fine of Rs.1,00,000/- and in default, to undergo simple imprisonment for one year. Challenging the said conviction and sentence, the appellant has filed this appeal.

2. The facts leading to the conviction could be summarised as follows:
On the basis of the information that the appellant Selvi @ Selvarani was indulged in selling heroin in Anna Nagar area, P.W.5 Assistant Commissioner of Police directed P.W.1 Sub Inspector of Police to go to the spot and take further action. On receipt of the order, P.W.1 Sub Inspector of Police accompanied with P.W.2 woman constable went to the spot and conducted a raid at about 8.00 p.m. on 19.2.1992. When

they were standing near Anna Nagar 18th Street junction, they saw the appellant moving in a suspicious manner and when they interrogated her, the appellant was about to run away from the place and thereafter, she was caught. When she was informed that she would be searched in the presence of the Assistant Commissioner of Police, she was willing to come with them. Accordingly, she was taken and produced before P.W.5 Assistant Commissioner of Police. When she was produced before P.W.5 Assistant Commissioner of Police, a search was conducted on her by P.W.2 woman constable and 36 small paper packets of heroin weighing about 6.089 grams were found in a rexine bag which was kept in her jacket and the same was recovered. As per the direction of P.W.5 case was registered by P.W.4 Inspector of Police. When the contraband and the accused were produced before the court concerned, the contraband was sent for analysis and the appellant herein was remanded to judicial custody. P.W.3 analyst after analysis, sent a report Ex. P3 stating that the contraband was

Dy-acetyle morphine which is heroin. After the completion of investigation, the charge sheet was filed against the appellant for offence under Section 8(c) read with Section 21 of the N.D.P.S. Act.

3. During the course of trial, P.Ws.1 to 6 were examined. Exs.P1 to P5 were marked. On the side of the defence, D.W.1 was examined. When the appellant was questioned under Section 313 Cr.P.C.she stated that she was innocent and a false case had been foisted against her.

4. After considering the materials placed by the prosecution, the trial court found the appellant guilty for the offences referred to above and convicted and sentenced as stated above.

5. Assailing the judgment impugned, learned counsel Mr V. Sambamurthy appearing for the appellant would submit that the conviction imposed upon the appellant is not legal inasmuch as mandatory provisions of the Act were not complied with by the respondent State.

6. I have heard the Additional Public Prosecutor Mr E.Raja, appearing for the respondent State.

7. Though several grounds have been urged by the learned counsel for the appellant attacking the judgment impugned, I am of the view that the judgment impugned has got to be set aside on a short ground namely, non-compliance of the provisions of Section 50 of the Act. According to the prosecution, P.Ws. 1 and 2 found the accused in Anna Nagar junction moving in a suspicious manner and she was taken to P.W.5 Assistant Commissioner of Police who is a gazetted officer. According to P.W.5 a search was conducted in his presence by P.W.2 woman constable. There is no dispute with regard to the fact that the search was conducted on the person of the accused. It is the case of the prosecution that a rexine bag containing 36 small paper packets was removed from the jacket of the appellant and the same was handed over to the searching officer. Under those circumstances, provisions contemplated under Section 50 of the Act

have to be complied with as it would very much apply to the facts of the present case. As per Section 50 of the Act, when a search of a person is conducted, before such search, the person concerned shall be given option to be searched either in the presence of the nearest gazetted officer or the nearest Magistrate. Admittedly, this option had not been given to the appellant before the search was conducted in the presence of P.W.5 Assistant Commissioner of Police. Though it is stated by the prosecution that P.W.5 himself is a gazetted officer, it is clear from the evidence of P.W.5 that he did not give option to the appellant as provided under Section 50 of the Act. In this context, the Supreme Court in the case of AHMED vs STATE OF GUJARAT (2000(3) Crimes 188(SC) observed as follows:

" ... For the purpose of complying with the provisions of Section 50, no differenciation can be made on a plain reading of the language used in Section 50, depending upon the officer who is going to search the person concerned. In our considered opinion, since the search is about to be effected on the basis of any prior information or personal knowledge, which the person going to search has the reasons to believe that an offence under the Act is being committed, then for the sanctity of the search itself, the person to be searched has been afforded the minimum right to be searched before another gazetted officer or the Magistrate and that right cannot be taken away, merely because the officer going to search happens to be a gazetted officer, who has been empowered either by the Central Government or by the State Government by a general or special order."

In view of the observations made by the Supreme Court as stated above, although the searching officer in the present case is the gazetted officer, the search conducted in his presence cannot be construed to be in compliace of Section 50, especially when the right tobe searched in the presence of the gazetted officer or some other gazetted officer or before the Magistrate has not been conveyed to the appellant. There is no dispute with regard to the fact that the provisions of Section 50 of the Act are mandatory as held by the Supreme Court in State of Punjab vs. Balbir Singh (1994 (1) Crimes 753) and State of Punjab vs. Baldev Singh (1999(6) SCC 172). In view of the noncompliance of mandatory provisions as required under Section 50 of the Act by the respondent State, the conviction imposed upon the appellant is liable to be set aside and the same is accordingly set aside. The appeal is allowed.

1.2.2002.

Index:Yes.

Internet:Yes.

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M. KARPAGAVINAYAGAM,J.

To

1. The Special Judge,

Special Court (NDPS Act)
Chennai (with records)

2. The Addl. Public Prosecutor,
Madras.

Crl.Appeal No.809 of 1998

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